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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 911

STATE OF TENNESSEE ex Rel. PHILIP J. SHERMAN AND JOHN V. AVAKIAN,

Petitioners,

vs.

O. W. HYMAN, Dean of the University of Tennessee College of Medicine et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

May it Please the Court:

Deeming the statement of the case made by the petitioners both inaccurate and inadequate, the respondents make the following statement:

The petitioners were students of the Medical Department of the University of Tennessee located at Memphis.

In August, 1940, it came to the attention of the faculty of this institution that questions to be used upon examinations had been surreptitiously taken and were being sold among the students of the institution (R. 19, 20). Thereupon a student council was organized for the purpose of ascertaining the guilty parties and recommending disciplinary action to the faculty (R. 20). At the outset of the inquiry, it was determined as a matter of policy that those students who had merely purchased such questions would not be disciplined (R. 31, 32).

As the testimony bearing upon the case of the two petitioners is separate, it will be necessary to make a brief statement with reference to each.

Philip J. Sherman.

At the hearing before this student council three witnesses gave testimony connecting Sherman with the sale of these questions (R. 39, 40, 44). Sherman was later called before this student council and denied all connection with the theft and sale of these questions (R. 44). He was then notified to appear before the faculty committee charged with final action, upon the next day. He declined to so appear, assigning business reasons for his refusal (R. 45, 88-89). The student council recommended to the faculty that Sherman be expelled (R. 48).

Thereupon at a meeting of the faculty committee Sherman was expelled for three causes, to-wit, on the basis of testimony heard by the student council, for refusing to cooperate with the student committee at its investigation and for refusing to appear before the faculty when summoned (R. 49).

At a later date Sherman made a request that his expulsion be reconsidered and the faculty committee, augmented by the President of the University, met for this purpose (R.

65), and there was read to him the substance of the testimony against him upon this charge (R. 67). He was heard in his own behalf and denied such testimony but he was unable to assign any rational reason leading to a belief in the falsity of the most important witness against him (R. 66-67). At this hearing he made no request that he be confronted with his accusers nor that he be accorded the right of cross-examination nor was any limitation placed upon his right to introduce testimony in his own behalf. Thereupon the faculty committee reaffirmed their earlier conclusion (R. 68).

Avakian.

One witness appearing before the student council gave testimony to the effect that Avakian had offered to sell him questions and as evidencing the genuineness of such questions had permitted him to read the first of such questions. A comparison of this question with those stolen proved it genuine (R. 34-35). Avakian was called before the student council and made a denial of the charges against him (R. 45). He was notified that he would be called before the faculty committee. A recommendation was made by the student council that he be arraigned before the faculty but no recommendation was made to the faculty as to the action to be taken by them (R. 51).

Avakian was duly called before the faculty committee and a summary of the testimony accusing him was read to him (R. 52). He denied the truthfulness of such testimony and assigned personal animosity on the part of the giver thereof as the reason for its falsity (R. 52). Thereupon the faculty deeming the evidence against him too contradictory for final action at that time, postponed any final decision until additional information upon the matter might be had (R. 53). Thereupon a former student of the col-

lege who refused to appear before the faculty committee, made the statement to the Dean of the college that Avakian had offered to sell him questions at a prior date. Since this witness refused to appear, the faculty agreed to accept his statement made to the Dean (R. 60). Avakian was called again before the faculty committee and informed of this additional testimony against him (R. 61). He denied it but was unable to suggest any plausible reason for its falsity (R. 61). The faculty committee voted to expel him (R. 61).

He was granted a rehearing before the same tribunal or organization as that sitting upon the rehearing of the case of Sherman. At this hearing he was permitted to be heard in his own defense and to review his previous testimony and the charges against him (R. 68).

So far as the record goes, upon this hearing, there was no request made by Avakian that he be confronted with his accusers, that he be permitted to cross-examine them, nor is it suggested that he was not allowed to present any testimony he wished to offer.

Both Sherman and Avakian appealed to the Board of Trustees of the University and a special committee was appointed to hear such appeal. It met and then for the first time was a demand made for a copy of the accusation and for confrontation and cross-examination (R. 13-15). The special committee determined that their function in the matter was appellate rather than original but expressly granted to each of the petitioners the right to introduce such testimony as they chose (R. 17). This committee of the Board of Trustees adverted to their lack of judicial powers and to the absence of any power on their part to compel the production of testimony (R. 17). After a consideration of the testimony the action of the faculty was affirmed (R. 75).

At all times there were in existence in Tennessee statutes providing for a review of the action of the boards and commissions exercising judicial functions with the express right to a trial *de novo* in a court of competent jurisdiction. These statutes are Sections 8989, 8990, 8998, 9008, 9014, 9015 and 9017 of the Code of Tennessee. They are printed in the appendix of this brief for the convenience of the Court.

Instead of undertaking to pursue this statutory procedure to obtain a review of the action of the tribunals of which complaint is now made with a trial *de novo* in a court of competent jurisdiction the petitioners instituted a collateral attack upon the action of the school authorities by filing a petition for a writ of mandamus seeking to compel their reinstatement upon the theory that the various proceedings above mentioned were absolutely void.

The Supreme Court of Tennessee did not, as stated in the petition for the writ (p. 5) hold that the petitioners were not entitled to a trial and hearing, but on the contrary, held that petitioners had been given such a hearing as met the requirements of justice and a fair and reasonable opportunity to make defense (R. 86-89).

It might be noticed at this point that the claim that Sherman was persecuted by virtue of his race and religion finds no basis in the record other than his own statement to such effect. That such is an afterthought upon his part may be inferred from the fact that nowhere in his pleading by which this action was instituted is there any suggestion that he was discriminated against by virtue of such, nor is there any mention of this fact in the opinion of the Supreme Court of Tennessee.

BRIEF.

I.

Statement Opposing Jurisdiction.

No claim of a right arising under the Constitution of the United States was specially set up and relied upon in the state court nor did the judgment sought to be reviewed deny any right, privilege or immunity specially set up or claimed under the Constitution of the United States.

Lynch v. *New York,* 293 U. S. 52;

Kipley v. *Illinois,* 170 U. S. 182, 42 L. Ed. 998;

Oxley Co. v. *Butler County,* 166 U. S. 648, 41 L. Ed. 1149;

Endowment Assn. v. *Kansas,* 120 U. S. 103, 30 L. Ed. 593;

U. S. Judicial Code, Sec. 344 subsec. (b).

II.

The statutes of Tennessee made adequate provision for a judicial review of the proceedings taken against petitioners with the right of a trial *de novo* in a court of general jurisdiction.

Code of Tennessee, Sections 8989, 8990, 8998, 9008, 9014, 9015, 9017;

Staples v. *Brown,* 113 Tenn. 639, 85 S. W. 254.

III.

Where there be an opportunity for judicial review, and a trial *de novo* at which time the validity of the proceedings may be tested, there is no lack of due process.

Bourjois v. *Chapman,* 301 U. S. 183;

Coffin Bros. v. *Bennett,* 277 U. S. 29;

Owenby v. *Morgan,* 256 U. S. 94;

Bragg v. *Weaver,* 251 U. S. 57, 64 L. Ed. 135;

Wilson v. *Standifer*, 184 U. S. 399, 415, 46 L. Ed. 612;
Backus v. *Ft. Street Depot Co.*, 169 U. S. 557, 42 L. Ed. 853.

IV.

In proceedings taken for the expulsion of a student from school, no formal trial in the sense of a legal proceeding is necessary. If the student be notified of the nature of the charge and be heard thereon, such constitutes a sufficient hearing.

State ex rel. v. *Clapp*, 81 Mont. 200, 263 Pac. 433, Certiorari denied 277 U. S. 591;
Vermillion v. *State*, 78 Neb. 107, 110 N. W. 736, 15 Anno. Cas. 401;
Koblitz v. *Western Reserve University*, 21 Ohio Cir. Ct. 144;
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White v. *Portia Law School*, 274 Mass. 162, 174 N. E. 187;
Tanton v. *McKenney*, 226 Mich. 245, 197 N. W. 510, 33 A. L. R. 1175;
Woods v. *Simpson*, 146 Md. 547, 126 Atl. 882, 39 A. L. R. 1016;
Board of Education v. *Purse*, 101 Ga. 422, 28 S. E. 896, 41 L. R. A. 593.

ARGUMENT

Upon the Jurisdiction of This Court.

As above stated, it is the insistence of the respondents that no adequate claim of a right, title or immunity arising under the Constitution of the United States was specially set up and relied upon by the petitioners in the Supreme Court and that the judgment of the Supreme Court of Ten-

nessee, as evidenced by its opinion, did not deny them any right, title or immunity set up under the Constitution. Upon the contrary, it appears from an inspection of the petition filed on behalf of the relators that they relied upon the laws and Constitution of Tennessee at all times as the source from which their rights sprung. That this is true will appear from the following excerpts from such petition.

From paragraph IV of the petition, we quote the following:

> "That such a student cannot be arbitrarily denied the right to continue his studies at the University, *but is entitled to a fair and full hearing and a reasonable opportunity to defend himself in accordance with the principles of Common Law* before he can be excluded * * *." (Italics ours). (R. 3.)

Likewise in paragraph IX of the original petition, we find the following averment:

> "Relator, feeling that he had not yet been afforded the *hearing guaranteed to him by the laws of the State of Tennessee*, sought legal advice * * *." (Italic ours.) (R. 5.)

In paragraph X of the petition we find the following statement:

> "Relator with his attorney appeared before the meeting of the Committee of Trustees, and *again requested a hearing conforming in some degree to the requirements of the law in this State* * * *." (Italic ours.) (R. 6.)

Finally, in the concluding portion of the petitions, the relators clearly relied upon their rights under the Constitution and the laws of the state as will be seen by the following quotation from paragraph XIII of such petitions:

> "as there is no other adequate remedy open to the relator *whereby he can obtain his re-instatement in*

the University to which he is clearly entitled by the constitution, the laws governing the University of Tennessee, and the contract which the relator had with the University of Tennessee; and that the officials herein named having refused to give relator a hearing required by law, * * *." (Italic ours.) (R. 8.)

The opinion of the Supreme Court of the State of Tennessee (R 81-90 incl.), makes no mention whatever of any rights relied upon arising under the Constitution of the United States. It is perfectly true that in the opinion the due process clause of the Constitution is mentioned but since Tennessee has a clause in its Constitution held to be synonymous with that of the Federal Constitution (Const. of Tenn., Art. I, Sec. 8; *State* v. *Staten*, 46 Tenn. 231, 244; *Railroad* v. *Harris*, 99 Tenn. 684, 704, 43 S. W. 115; *Harbison* v. *Iron Co.*, 103 Tenn. 421, 431, 53 S. W. 955), in view of the reference to the Constitution and laws of Tennessee in the petitions of the relators, this reference to the due process must be taken as applicable to the guaranty of the State Constitution in the absence of a positive averment to the effect that the Constitution of the United States was relied upon. This Court has held that an averment that action or a statute violates constitutional rights will be taken to refer to the State Constitution rather than of the United States in the absence of a specific mention of the later organic law. *Endowment Assn.* v. *Kansas, supra; Kipley* v. *Illinois, supra.*

The respondents respectfully insist that the case of *Oxley Co.* v. *Butler County, supra*, is directly in point upon this question with reference to the necessity of alleging *specially* the reliance upon a right, claim or immunity under the Constitution of the United States. From it, we quote the following:

"This court may re-examine the final judgment of the highest court of a state when the validity of a treaty

or statute of or an authority exercised under the United States is 'drawn in question' and the decision is against its validity, or when the validity of a statute of, or an authority exercised under, any state is 'drawn in question' on the ground of repugnancy to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity. *But it cannot review such final judgment, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was 'specially set up or claimed' in the state court as belonging to such party, under the Constitution* or some treaty, statute, commission, or authority of the United States. U. S. Rev. Stat., sec. 709.

"*Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege, or immunity was intended to be asserted.* For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question." (Italic ours.) (Page 653.)

"The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit, and therefore no opportunity to be heard in vindication of their rights. Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege, or immunity 'specially set up or claimed' under the Constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler county circuit court in the suit instituted by the county of Butler was not consistent with the due process of law required by the 14th Amendment of the Constitution of the United States. But can it be said that the plaintiffs *specially* set up or claimed the protection of that Amendment

against the operation of that decree by simply averring—without referring to the Constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in U. S. Rev. Stat., Sec. 709. These words were in the 25th section of the judiciary act of 1789 (1 Stat. at L. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties, or statutes of the United States. *The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission, or authority of the United States, he must so declare; and unless he does so declare 'specially', that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.*" (Italic ours.) (Pages 654-55.)

In the comparatively recent case of *Lynch v. New York, supra,* we find the rule reaffirmed in the following language:

"It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. *But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.*

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Eustis* v. *Bolles*, 150 U. S. 361, 366, 367; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Mellon* v. *O'Neil*, 275 U. S. 212, 214. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. *Allen* v. *Arguimbau*, 198 U. S. 149, 154, 155; *Johnson* v. *Risk, supra; Wood Mowing & Reaping Machine Co.* v. *Skinner, supra; Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 596, 599; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 302, 304." (Italic ours.) (Pages 54-55.)

Upon the strength of the foregoing authorities, the respondents respectfully insist that it nowhere appears either in the proceedings on behalf of the petitioners nor in the opinion of the Supreme Court of Tennessee sought to be reviewed that any claim of right under the Constitution of the United States was relied upon by the petitioners nor passed upon by the Supreme Court of Tennessee; but on the contrary, the Supreme Court of Tennessee in its opinion apparently treated the case as one arising under state law and the provisions of the State Constitution and nowhere in its opinion does it appear that it was aware that it was undertaking to dispose of or pass upon a Federal question.

So, therefore, the respondents respectfully insist that this Court should not take jurisdiction of the petition for this reason, if for no other.

Argument on Points II and III.

It is our insistence that the statutes of Tennessee accorded to the petitioners the right to a judicial hearing *de novo* of their expulsion with the right to supersede such expulsion and that having failed to avail themselves of this statutory right, they may not be heard to insist that they were not accorded due process. The code section relied upon by the respondents in general authorize the issuance of the writ of certiorari in all cases where an inferior tribunal, board or official exercising judicial functions has exceeded their jurisdiction or acts illegally; and also rights to review the action of such tribunal where no appeal be granted by law. Full provision is made for the issuance of a supersedeas by the sections mentioned and the Supreme Court has expressly held that these sections authorize on the part of the state court, a court of general jurisdiction, appellate and revisory jurisdiction over all inferior tribunals created by the legislature and vested with judicial powers. *Staples* v. *Brown, supra.*

As showing the extent to which the holding of the Supreme Court of Tennessee in this case goes, we quote the following from its opinion:

> "Circuit courts have original jurisdiction of all cases where jurisdiction is not conferred upon some other court, and a general appellate and revisory jurisdiction over all inferior tribunals, councils, and boards which may from time to time be created by the legislature and vested with judicial functions, to review their proceedings in all cases where they have exceeded their jurisdiction, or acted illegally or erroneously. Where no appeal or writ of error will lie, this jurisdiction

may be exercised by writs of certiorari and supersedeas, *and the case retried upon the merits*" (R. 644-45).

"This jurisdiction of the circuit court to supervise and review upon the merits the proceedings of all inferior jurisdictions, especially those proceedings not according to the course of the common law, by certiorari and supersedeas, where no appeal is allowed or writ of error will lie has been recognized and exercised from the earliest days of our judicial history, and is now too firmly established by constitutional provision, statutory enactment, and judicial decision to be a subject of controversy" (R. 646).

"There is, then, no doubt but that the circuit court has a general appellate and revisory jurisdiction over all inferior tribunals created by the legislature and vested with judicial powers, *which it may exercise by certiorari and supersedeas where no appeal or writ of error will lie,* for the correction of their judgments, not only when they have exceeded their jurisdiction or are acting irregularly, but *for errors of fact or law committed by them*" (Italic ours) (R. 655).

A number of instances of the use of this writ to review the proceedings of inferior tribunals are given in the opinion but will not be repeated here for the sake of brevity. It is sufficient to say that under the authority of this case the proceedings of the Board of Trustees or of the faculty committee could have been reviewed by the use of this writ and a trial *de novo* held thereon in the state court, a court of full and adequate jurisdiction. Obviously, the Board of Trustees of the University is charged by statute with the government and control of that institution. As incident to such government and control, necessarily they must determine questions governing the conduct of students and the punishment to be inflicted for breaches of discipline. The governing body of any institution of learning possesses

this power inherently; and in so sitting in judgment upon disciplinary matters, the Board of Trustees of the University necessarily acts by virtue of their legislative creation and also exercises quasi judicial functions and when the instances of the use of this writ to review proceedings of similar quasi judicial tribunals be examined as such instances are set out in the case of *Staples* v. *Brown, supra,* there can be no doubt in the mind but that this writ could have been employed to obtain a trial *de novo* of the charges against the petitioners, such trial to be heard in a court of competent jurisdiction.

Now then, the respondents respectfully insist that where the statutes of a state accord the right to a judicial hearing in connection with any administrative or quasi judicial hearings, due process of law is thereby accorded and that a party can not be heard to insist that he was not accorded due process of law where he failed to avail himself of a remedy given by the state which would accord him a full and complete hearing. Without any extensive compilation of authorities, we respectfully insist that the authorities cited in the brief proper, *supra,* upon this point clearly sustain our position. We quote from only one of them, to-wit, *Wilson* v. *Standifer,* wherein it is said:

> "It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, have always held that due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered. Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. ed. 616; Spencer *v.* Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Gallup *v.* Schmidt, 183 U. S. 307, ante, 213, 22 Sup. Ct. Rep. 164; King *v.* Mullins, 171 U. S. 414, 43 L. ed. 214, 18 Sup. Ct. Rep. 925" (R. 415).

Instead of pursuing the statutory remedy available to them, the petitioners chose to ignore the same and to treat

the proceedings as being entirely invalid by filing the present proceeding which constitutes a collateral attack upon the validity of the actions of the faculty committee and of the special committee of the Board of Trustees. All questions with reference to the validity of the action under the state laws have been foreclosed against the petitioners by the decisions of the Supreme Court of Tennessee and the respondents respectfully insist that in view of the fact that a complete and adequate remedy for the review of the proceedings against them carrying with it the right to a hearing *de novo* and to a supersedeas staying the operation of the action of the school authorities was ignored when such procedure would have accorded due process, the petitioners can not now be heard to insist that the judgment of the state court did not accord them due process.

Argument on Point IV.

The respondents respectfully insist that when the hearing accorded the petitioners in the present case be tested by the authorities, it will appear that they were clearly accorded the type of hearing to which they were entitled under the law. The record shows (R. 66-7-8) that upon the hearing ordered by the Board of Trustees to be held by the faculty committee and the president, each of the petitioners was called before this committee to which had been superadded the president of the university. The charges against them were discussed in their presence and the substance of the testimony against them was likewise read in their presence. They were permitted to deny this testimony, to assign reasons for its falsity and the motives which they believed actuated the same and to make any further explanation desired by them. There was no complaint, so far as the record goes, upon their part that they were not thoroughly conversant with the charges against them, that they did not

know the identity of their accusers, nor so far as the record goes was there any demand from them that they be confronted with their accusers at this time or be permitted to cross-examine them.

Now, then, the respondents respectfully insist that the petitioners were not entitled to a multiplicity of hearings. When they were accorded one hearing at which they were furnished the opportunity to be heard in their own behalf and to deny the charges against them and to introduce such testimony as they might desire in *contradiction* to the accusations against them, their expulsion might lawfully follow upon an adverse finding at the conclusion of such hearing. There is no finding of anything akin to arbitrary or capricious action on the part of this executive committee. Certainly it definitely appears in the case of Avakian that the committee was unwilling to adjudicate him guilty upon the testimony of one witness with whom Avakian had had difficulties, and it was not until corroborating testimony connecting Avakian with the contemplated sale of such questions was adduced that the committee was willing to inflict expulsion upon him. Certainly this incident demonstrates a complete desire upon the part of this executive committee to reach the truth of the matter and not act until they were convinced as to wherein lay the truth.

But it may be contended that a demand for confrontation, for a copy of the accusation, for permission to cross-examine the witnesses and various other constitutional safeguards was made at the hearing before the committee of the Board of Trustees. We admit this. Our answer thereto is as follows: The Board of Trustees was under no legal obligation to accord a hearing to the petitioners. They might have denied the same and no rights of the petitioners, statutory or constitutional, would have been denied. It was completely discretionary for the Board of Trustees as to whether or not they should hold such hearing. Having the

power therefore to deny a hearing entirely at their hands, it lay well within their discretion to determine the type of hearing which they would hold. They were not obligated to hold a hearing *de novo,* but they might, as they did, hear the matter as does many a court review the proceedings of inferior tribunals, to-wit: upon the record produced before such inferior tribunal and with such additional proof as the parties might care to offer.

It is strenuously insisted that because the testimony heard by this student council and faculty committee was not under oath, that the petitioners were not accorded a fair hearing. Our answer to that is that there is no statute in existence in Tennessee authorizing the administration of an oath by school authorities in an investigation of this type and in the absence of authority upon their part to hear testimony under oath, the administration of an oath by a functionary empowered to swear witnesses would be an idle gesture and would give to the testimony no more verity and no more solemnity than had such oath been omitted.

The most strenuous insistence made on behalf of the petitioners was the absence of the opportunity to cross-examine the witnesses against the petitioners. This insistence apparently totally loses sight of the fact that neither this student council nor the faculty committee possessed then, nor possess now, the power to compel the attendance of witnesses and to punish a refusal to testify, and in the absence of the possession of such a power how can it be said with any degree of seriousness that the relators were denied their constitutional rights.

But it is urged most strenuously that because the proceedings before the student council indicated that one student was notified that he would not be permitted to remain in school unless he told all that he knew, that such instance showed that the University authorities could have

required the attendance of the witnesses if they had so chosen. In other words, counsel for petitioners insist that the University authorities were bound to use every coercive method at their command to require that the petitioners be confronted with the witnesses against them before it could be said that the duty to accord them a hearing on the question of their expulsion had been fairly complied with.

The respondents respectfully insist that such cannot be the law and that when school authorities use all of their legal powers to accord to one accused of misconduct a fair and impartial hearing, they are not required to exercise coercive measures or to use any type of extra legal influence to procure the attendance of witnesses. Cases no doubt occur frequently where the witnesses to the misconduct for which expulsion be sought, are not subject to the discipline of the school authorities to procure the involuntary attendance of such witnesses. In the present case one of the witnesses against Avakian was a former student of the school. He directly refused to appear before the faculty committee but did consent to appear and state to Dr. Hyman just what he knew. Now, then, the same rule must apply to all witnesses. There cannot be a confrontation as to certain witnesses and a non-confrontation as to others, and where it is obvious that oftentimes very material witnesses will not be subject to compulsory attendance but the authorities conducting such investigation are dependent upon their voluntary statement or appearance in undertaking to determine the facts, how can it be said that the failure to accord the person accused the right to cross-examine deprives him of a fair hearing where the authorities conducting the hearing possess no legal power to require the witnesses in question to appear for such cross-examination?

It is the insistence of these respondents that great latitude should be allowed scholastic authorities in disciplinary matters and where there has been a substantial effort to hold

a hearing and to hear both sides of the controversy and after such hearing a decision has been reached by the appropriate school authorities upon a charge within their jurisdiction, their conclusions ought not to be reviewed or disturbed by the courts for any supposed inadequacy of the nature of the hearing or a failure to comply with formalities substantially beyond their powers of compliance. The petitioners were entitled to one hearing and no more. They were given that as well as an additional review by the Board of Trustees. On their hearing before the faculty committee they took no exception to the sufficiency of the charges against them. They made no complaint there but that they were definitely aware of the nature of the accusation and the substance of the testimony against them. They made no demand that they be confronted by their accusers nor that they be permitted to cross-examine the witnesses against them. They were allowed to state facts in their own defense as fully and completely as they chose. There was no limitation upon the admission of testimony tending to exculpate them from the charges lodged against them, and there was certainly, so far as the record goes, no insistence at that time that any of the matters now complained of were denied them. Under such circumstances it is our insistence that they were accorded a complete hearing in the sense that such a hearing is required prior to expulsion.

So far as the petitioner Sherman be concerned, the Supreme Court of Tennessee adverted to the fact that he declined to appear before the faculty committee when they notified him so to do and held that this clearly showed an unwillingness to cooperate in the investigation and progress. That Sherman so declined is undisputed (R. 88-9). His refusal to cooperate was one of the grounds upon which the expulsion of Sherman was based (R. 49). So far as Sherman be concerned, therefore, his expulsion may rest upon the admitted fact that he did refuse to cooperate and the suffi-

ciency of this as a ground for expulsion does not present a question arising under the Constitution of the United States and his expulsion was apparently sustained by the Supreme Court of Tennessee upon this as well as other grounds.

When we come to the law, it is the insistence of the respondents that the overwhelming weight of authority sustains their position that a formal hearing is not necessary, proceeding with the solemnity of a judicial proceeding, but upon the contrary, all that is necessary is that the student be apprised of the charge, given an opportunity to be heard in his own defense, and that if such be done he may be lawfully expelled if the governing body of the institution determined his guilt from such informal hearing.

State v. *Clapp, supra,* seems to be the leading authority dealing with this contention. From it, we quote as follows:

> "The court made a finding 'that the relatrix Janet T. Ingersoll was not given a formal hearing in which written charges were filed against her and in which she was permitted to meet face to face the witnesses against her and cross-examine the same.' The main attack of counsel for plaintiff on the court's judgment is based upon the contention that under this finding no suspension of the plaintiff was authorized, it being their contention that she was entitled to a formal hearing upon the charges made against her; to be confronted with the witnesses who gave information against her, with the privilege of cross-examining them, and that she did not have an opportunity to call witnesses in her own behalf. This requires us to determine just what is meant by a hearing in a matter such as this.
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> "It certainly cannot be maintained that it means a hearing like that which constitutes the trial of a chancery suit, or like the examination of one who is charged with the commission of an offense against the law, for the university to compel the attendance of witnesses or to force them to testify if they were in attendance.
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> "Counsel for plaintiff have cited in support of their contention Commonwealth ex rel., Hill *v.* McCauley, 3

Pa. Ct. Rep. 77, and Anthony *v.* Syracuse University, 130 Misc. Rep. 249, 223 N. Y. S. 796. The first of the cited cases lays down the rule, as stated in the syllabus:

"'The student is entitled to notice of the charge preferred against him so that he may be able to prepare to meet it; and also to hear the proofs, with the full opportunity to question the witnesses and to call others to explain or contradict their testimony. Where it appears, upon the proper application of the student, that he had been dismissed without such hearing or trial, the court of common pleas will order his restoration by the writ of mandamus.'

"In 11 C. J. at p. 998, it is said:

"'A college cannot dismiss a student except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses, and to rebut the evidence.'

"In support of this text Commonwealth ex rel., Hill *v.* McCauley, supra, and Gleason *v.* University of Minnesota, 104 Minn. 359, 116 N. W. 650, are cited as authority.

"A reading of the Gleason Case discloses that it has no application whatever to the rule announced in the text.

"In Anthony *v.* Syracuse University, supra, there was in question the validity of a rule of the university which reserved to it 'the right to require the withdrawal of any student at any time for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be given.' A student had been summarily dismissed without charges having been made against her, and her request to be advised of the charges and for a hearing thereon had been denied. The court held the rule void, and directed that the student should be reinstated. In the course of the opinion the court quoted the language from 11 C. J. 998, which is above set forth.

"These are the only authorities which have been called to our attention which hold that, before a student

may be suspended from a college or university, it is necessary to hold a hearing attended with substantially the strictness and formality of a proceeding before a court, and they are based solely upon the language used in Commonwealth ex rel., Hill *v.* McCauley, above.

"A great number of decisions are opposed to the rule laid down in the authorities above cited. In Tanton *v.* McKenney, 226 Mich. 245, 197 N. W., 510, 33 A. L. R. 1175, it appeared that a young woman, 18 years of age, attended the State Normal College at Ypsilanti during the fall term of 1921 and the winter term of 1922, and was refused readmission for the spring term of 1922. The refusal was based on an investigation of plaintiff's conduct made by the dean of women of the institution, and approved by the president. Before taking the action, the dean called the plaintiff in, fully apprised her of the information which had come to her as dean of women, and gave her ample opportunity to explain her conduct. The plaintiff's counsel in the case contended that she had been expelled without a hearing, but the court held the proceeding above recited was a sufficient hearing under the circumstances.

"In Smith *v.* Board of Education, 182 Ill. App. 342, a student was expelled from high school because of disobedience of a rule forbidding membership in a high school fraternity. The expulsion was made without a formal hearing, and he claimed that for that reason it was unlawful. In holding that no formal notice or hearing was necessary in such a case, the court said:

"'In order to carry out the powers and duties of school directors or board of education of high school districts, no form of trial or hearing is prescribed. The powers are given, the duties are laid down and the board of education is authorized in a reasonable and parliamentary way to investigate charges of disobedience or misconduct, and to suspend or expel any whom they may find guilty of any violation of any of their reasonable and valid rules.'"

In *Koblitz* v. *Western Reserve University,* 21 Ohio Cir. Ct. R. 144, it is said:

> "Custom, again, has established a rule. That rule is so uniform that it has become a rule of law; and, if the plaintiff had a contract with the university, he agreed to abide by that rule of law, and that rule of law is this: That in determining whether a student has been guilty of improper conduct that will tend to demoralize the school, it is not necessary that the professors should go through the formality of a trial. They should give the student whose conduct is being investigated every fair opportunity of showing his innocence. They should be careful in receiving evidence against him; they should weigh it; determine whether it comes from a source freighted with prejudice; determine the likelihood, by all surrounding circumstances, as to who is right, and then act upon it as jurors, with calmness, consideration and fair minds. When they have done this and reached a conclusion, they have done all that the law requires of them to do.
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> "Upon a consideration of the foregoing authorities we are impelled to the conclusion that to hold to the rule laid down in Commonwealth ex rel., Hill *v.* McCauley, and seemingly approved in Anthony *v.* Syracuse University, would lead to a wholly impractical and unworkable situation. *As above pointed out, the president of the university has no authority to compel the attendance of witnesses at a hearing or to compel them to testify if they were present. To hold that the power of suspension could only be exercised after a hearing had been held, such as is indicated in the cases last referred to, would be to hold that the power was practically ineffective, except where witnesses voluntarily attended and testified. Such a rule would be destructive of the power vested in the president. When the plaintiff was called before the deans' council on January 19, informed of the charges made against her, given opportunity to deny the same, and make a statement in connection therewith, of which privileges she did not avail*

herself, she was accorded a sufficient hearing." (Italics ours.) 81 Mont. 212-216, 263 Pac. 436-7.

By way of comment, it should be noted that *Anthony* v. *Syracuse,* referred to in the above quoted excerpt and strongly relied upon by the petitioners (see p. 29 of petition), was reversed in *Anthony* v. *Syracuse,* 231 N. Y. S. 435, 224 App. Div. 487. The attention of counsel for petitioners was called in the lower court to the fact that this case had been reversed upon appeal but it seems that he persists in undertaking to rely upon it as authority despite its reversal.

In *Vermillion* v. *State, supra,* the Supreme Court of Nebraska used the following language:

> "The statute under which the board is authorized to expel a pupil does not, in terms, provide for any notice, either to the pupil or to the parents, that a hearing is to be had or action taken. It is probably true that in such proceedings the board acts in a quasi judicial manner, but that no trial in the sense of a judicial inquiry is contemplated by the statute is evident. By what process is the attendance of witnesses to be secured, or, if they attend, who is to administer the oath or punish for a refusal to be sworn? What punishment could be inflicted upon those giving false testimony? *The proceeding, in our judgment, is more like the action of an administrative board in making inquiry as to existing facts upon which they are required to act. In doing this they may use their own judgment and pursue any course which, in their opinion, will fully inform them of the facts attending the subject-matter of the inquiry.*" (Italic ours.) 78 Neb. 110, 110 N. W. 737, 15 Ann. Cas. 302.

In *Morrison* v. *Lawrence, supra,* the Supreme Judicial Court of Massachusetts discussed the question as follows:

> "In the present case a hearing was had, and the only objection to it is that the school committee refused to permit pupils of the school to be compelled to give testi-

mony in regard to matters between themselves and the teacher and the plaintiff, although ready to receive testimony from any of them who would testify voluntarily. This was at most an error in regard to the admission of evidence. It may or may not have had an important bearing upon the hearing, but it has not been contended that the committee were acting otherwise than in good faith. Doubtless they believed that a compulsory examination of the pupils in regard to matters which they probably considered confidential would be detrimental to the interests of the school. *The decision in Bishop v. Inhabitants of Rowley does not go so far as to hold that a hearing in regard to the exclusion of a pupil from a school must be conducted with all the formalities of a trial in a court, or that a material mistake, innocently made by a school committee in conducting a hearing, will make his exclusion unlawful. So to hold would be inconsistent with the previous decisions of the court, as well as with some of the language of that case.*" (Italic ours.)

In *Goldstein* v. *University, supra,* the Supreme Court of New York laid down the rule in the following language:

"The offenses having been committed in the immediate presence of the faculty, they were at once examined, and the parties heard. The plaintiff had every opportunity of making any explanation that would exculpate him from the charge of lying, or relieve him from that of bearing false witness against his fellow student. *Our attention has not been called to any law or rule or regulation which required any form or time of notice, or any particular method of trial before the faculty of this university.*" (Italic ours.)

In *Woods* v. *Simpson, supra,* in discussing the right of officials of a school to use discretion in determining the necessity for the separation of certain students from the student body, the Supreme Court of Maryland said:

"We do not mean to pass judgment on the sufficiency of this student declining to answer the question of the

president and the dean as a separate ground for refusing her admittance to her third year; it would not be necessary to do so, even if it were within our province, for we conclude from the testimony that during the student's previous two years, also, she had given the officials some reason to consider the effect of her actions and her attitude on the university and its proper upkeep, and that, on the whole, experience with her did fairly raise a question whether she could be continued in this student body without results which ought to be avoided; and the decision of that question was within the discretion of the officials, and is, in our opinion, not to be interfered with by the courts."

In *White* v. *Portia Law School, supra,* while there is no discussion of the express right of a hearing, the only type of hearing accorded the student in that case was one before the dean of the school where her conduct was related to her and she was given opportunity to explain or justify.

In *Board of Education* v. *Purse, supra,* the expulsion of a child for misconduct of its mother in and about the school was sustained and it is obvious that no sort of hearing could have been heard in this case charging the child with any offense or misconduct.

These respondents respectfully insist that the above authorities demonstrate quite clearly that an informal hearing is entirely sufficient to warrant the expulsion and all that is necessary in such hearing is that the person be apprised of the charge against him or her and be given an opportunity to be heard in his own behalf. The petitioners in the present case were accorded this type of hearing.

We respectfully insist that to require an educational institution to go through the formalities of a trial at law would be productive of such administrative difficulties and hardships as to make the right of expulsion useless and a vain thing. The power to compel the attendance of witnesses and to punish for non-attendance often is withheld from

such institutions and in the absence of that power, we hardly see how a formal hearing could be heard.

In conclusion, the respondents respectfully insist that the petition is without merit and should be denied.

Respectfully submitted,

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This is to certify that I have mailed A. L. Heiskell, Sterick Building, Memphis, Tennessee, copy of this brief.

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